Democracy in Search of Utopia, 99 DICK.L.REV. 527, 528, 531 (1995).

The District relies on two factual assertions to support its argument for heightened scrutiny: 1) the asserted "universal" rule of taxing income at its source; and 2) the alleged Congressional discrimination and bias demonstrated by the asserted structural imbalance. Neither is correct.

The decision below is correct and need not be reviewed. In order to avoid duplication, Maryland incorporates the arguments of the United States and the Commonwealth of Virginia.

REASONS FOR DENYING THE WRIT

A. The Petition Does Not Present Any Compelling Reason For Further Review, As Required By Rule 10.

The District makes little or no effort to demonstrate how its petition satisfies the criteria for granting a writ of certiorari, as set forth in Rule 10. There is no conflict among the courts of appeals or State courts of last resort. Nor has the court below departed in any way from the accepted and usual course of judicial proceedings, especially in a manner that invokes this Court's supervisory power. Instead, the District relies solely on assertions of Congressional discrimination and bias or, alternatively, a purported "universal" rule of taxation, to support its request for review.

The District was created solely to serve federal purposes. The federal treasury should support the federal city and, in fact,

it does. Under the Revitalization Act of 1997[3], Congress provided unprecedented financial aid to the District. That statute expressly mandates that Congress carefully consider the impact of each federal restriction - - including the Congressional prohibition on a nonresident income tax - - when it determines how much federal money should be provided to the District.

As will be explained below, further review is unwarranted because the District's argument is little more than its expression of discontent with the unique status it occupies under the Constitution as the seat of our National government. Thus, the District's quarrel is not with the well-reasoned analysis of the lower courts in this case, but with the Constitution itself. Contrary to the District's suggestion, there is no universal rule that would authorize the District to impose taxes on nonresidents. As the lower courts correctly held, the prohibition on such taxes is not unlawful discrimination precisely because the Constitution renders the District unique and because it authorized Congress to adopt this, and other, policies for the governance of the federal city.

The District's position conflicts with precedent; the "universal" rule is inapposite; and the District occupies a unique status and is not subject to discrimination. Congress properly exercised its plenary power when it passed the Home Rule Act, and heightened scrutiny has no place in this analysis. There is no compelling reason to review the decisions below.

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[3]Title XI of the Balanced Budget Act of 1997, P.L. 105-33, at §11601(c)(1), known as the National Capital Revitalization and Self-Government Act of 1997, 111 Stat.712 (§§11000-11723)(1997)(the "Revitalization Act").

B. There Is No Need For Heightened Scrutiny Because The District's Argument Is Inconsistent With Precedent.

Tacitly conceding that it cannot prevail under a "rational relationship" standard, the District argues for heightened scrutiny of its challenge to the Home Rule Act. Its argument, however, is inconsistent with this Court's precedent holding that, under the Seat of Government clause, Congress has plenary power over the District as its "State" legislature. Congress has the same powers over the District that a State legislature has over subordinate units, and States can created subordinate governments with limited taxing power. Neither the alleged "universal" rule of taxing income at its source nor the asserted differential treatment of the *sui generis* entity known as the District, justify heightened scrutiny of the Home Rule Act, because the District's argument would, if accepted, lead to the conclusion that Congress has less power than a State legislature. That conclusion is inconsistent with established precedent, as set forth below.

Congress, in legislating for the District, has all the powers of a state legislature. *Loughborough v. Blake,* 18 U.S. 317, 318 (1820); *Gibbons v. D.C.,* 116 U.S. 404, 408 (1886); *Adams v. Clinton,* 90 F.Supp.2d 35, 34, 49 (D.D.C. 2000), *aff'd,* 531U.S. 940 (2000); *Firemen's Ins. Co. of Washington, D.C. v. Washington,* 483 F.2d 1323, 1327 (D.C.Cir. 1973); *District of Columbia v. American Federation of Government Employees,* 619 A.2d 77, 81 (D.C. 1993), *cert. denied,* 510 U.S. 933 (1993) ("AFGE").

The "Seat of Government," or "District," Clause, Art. I, § 8, cl. 17, gives Congress plenary power over the District. *Palmore v. U.S.,* 411 U.S. 389, 397 (1973); *Loughborough,* 18

U.S. at 317. In short, "the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is congress." *Metropolitan R.R. Co. v. D.C.,* 132 U.S. 1, 9 (1889).

Unlike the States, the District government was created as a convenience to Congress. Because Congress was not required to create it, Congress was not compelled to delegate all powers of taxation to it. *See Marijuana Policy Project v. U.S.,* 304 F.3d 82, 83-84 (D.C.Cir. 2002); *see also Metropolitan,* 132 U.S. at 8; *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178-79 (1907); *Williams v. Mayor of Baltimore,* 289 U.S. 36, 40 (1933); *U.S. ex rel. Columbia Heights Realty Co. v. Macfarland,* 32 App.D.C. 53 (1908).

The District's argument is logically flawed because it depends entirely upon the District's erroneous insistence that the federal city must be treated as a State. In fact, the District is not a State, but a municipal corporation. *Metropolitan,* 132 U.S. at 9. Thus, the inherent powers of the fifty sovereign states differ from that of an entity that was created, and could be abolished, by a simple act of Congress.

While Congress's powers vis-a-vis the States are constrained by the Tenth Amendment, Congress's power under the Seat of Government Clause is sweeping. For example, although the Congress may not constitutionally create Article I courts under its broad bankruptcy power, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), it may do precisely that in the District under the Seat of

Government Clause, *Palmore*, 411 U.S. at 398, 410; *see AFGE*, 619 A.2d at 84 n. 7.

The District's argument presents an anomaly. While the District must admit that Congress's plenary power is equal to that of a State, and that State legislatures are not compelled to delegate the power to tax nonresident income to subordinate governments, the District asserts that Congress was compelled to delegate this power. Thus, the District posits that Congress, acting under the Seat of Government Clause, has less power than a State legislature; however, that proposition contradicts binding precedent. It cannot, therefore, support the District's request for review and heightened scrutiny.

C. There Is No Need For Review and Heightened Scrutiny Because The District's Status Is Intentionally Unique In Our Federal System And The Remedy For The Alleged Problem Has Already Been Provided By Congress

As the seat of the federal government, the District is unique. *See Firemen's Ins. Co.*, 483 F.2d at 1328; *Adams*, 90 F.Supp.2d at 46 n. 16. It obtains unique benefits, such as special federal appropriations, tourism, the Smithsonian, the White House, and the National Gallery, and it bears unique burdens, such as building height limitations, "exclusive" legislative jurisdiction in Congress, the Congressional veto,

absence of voting representation, restrictions on taxation, and, until modern times, the lack of the right to vote for President.[4]

The District government is "an executive agency of the Federal Government. . . ." P. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH.L.REV. 311, 337, 340 (1990); *see*, *Commuter Tax: Hearings and Markups of the Subcomm. on the District of Columbia on H.R. 11303, H.R.* 10116, 95th Cong., 2d Sess.,181 (Stmt. of Rep Harris); BACKGROUND at 1442 (suggesting creation of "municipal government similar to that provided in all other cities. . . ."); *id.* at 1487 (same); *see Adams,* 90 F.Supp.2d at 47. In fact, in the Complaint at ¶17, the District describes itself as a "municipal corporation."

The decision below applied settled principles to unchallenged facts in the context of the Seat of Government Clause. In pertinent part, both lower courts simply held that strict or heightened scrutiny was inapplicable to what is a purely economic claim. Furthermore, the decisions below do not leave the District without a remedy. Instead, they point the District

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[4]This unique status is well-illustrated by the District's "long arm statute." If an out-of-state person transacts business in Maryland, that person is subject to long arm jurisdiction, MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b); however, if a person enters the District to do business with the federal government, the "government contacts exception" prohibits the exercise of personal jurisdiction. *Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 786-87 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1210 (1984). It is simply not reasonable for the District to assert personal jurisdiction on the same terms as the fifty states, because people have no choice but to transact federal business in the District.

to the single and proper route for redress: to Congress through the Revitalization Act.

D. There Is No Need For Heightened Scrutiny Because The "Universal" Rule Posited By The District Is Inapposite; It Applies Only To States, And The District Is Not A State.

The alleged "universal" rule of taxing income at its source, upon which the District's claim is founded, does not exist in the form described by the District. There is no "universal" rule of taxing income at its source, at least as framed by the District. For example, Maryland does not tax the wage income of District residents who are employed in Maryland. MD. CODE ANN., TAX-GEN. § 10-210(e), §1-101(u)(2); *Commuter Tax: Hearings and Markup Before the Subcomm. on Fiscal Affairs and the Comm. on the District of Columbia on H.R. 11579 and H.R. 14621*, 94th Cong., 2d Sess.176 (1976).[5]

In the seminal case, this Court held that "States" have the power to tax nonresident income. *Shaffer v. Carter*, 252 U.S. 37 (1920). The Court specifically rested this decision on the "fundamental principles" that "the states have general dominion, and, saving as restricted by particular provision of the federal Constitution, complete dominion over all persons, property, and business within their borders." *Id.* at 49. Thus, as "an incident of sovereignty," which the District lacks, "[S]tates

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[5]Maryland taxes business income under TAX-GEN. § 10-210(b)(2). Maryland citizens operating unincorporated businesses in the District are taxed by the District. *Roach v. Comptroller*, 327 Md. 438, 440-41, 610 A.2d 754, 755 (1992); D.C. CODE ANN. §§47-1808.01, *et seq.*

have full power to tax. . . ." *Id.* (citation omitted). The District's reliance on an alleged "universal" principle to support its heightened scrutiny argument is misplaced.[6] It is a city, not a sovereign State. To the extent to which there is a "universal" rule, it is inapposite.

Local governments do not have a State's inherent powers of sovereignty. For example, local governments in Maryland do not have the inherent power to tax nonresident income: "Since the power to tax is an inherent attribute of sovereignty and since a County is only an agency or subdivision of the State, it is fundamental that the power of a County (or County Board of Commissioners) to tax is not inherent but is a delegated power and exists only when and to the extent granted by the State. The authority of a municipality to tax is similarly a delegated power." *Griffin v. Anne Arundel County,* 25 Md.App. 115, 126, 333 A.2d 612, 619, *cert. denied,* 275 Md. 749 (1975). This description of delegated powers states the accepted rule.

Diligent research has not disclosed any authority suggesting that a municipality automatically acquires the inherent power to impose a nonresident income tax when it receives home rule. *Compare City of N.Y. v. State of N.Y.,* 94 N.Y.2d 577, 582, 730

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[6]Many states waive the power to impose nonresident taxes. II J. Hellerstein and W. Hellerstein, State Taxation, ¶20.10[6](Warren Gorham & Lamont 3d ed. 2000). Thus, while Maryland is one of the 41 states that "authorizes" nonresident income taxes, Maryland does not impose those taxes on the wages of residents of any reciprocal jurisdiction, TAX-GEN. §§10-210(e), 1-101(u)(2), including the District. This further erodes the "universality" concept as a factual predicate for heightened scrutiny.

N.E.2d 920, 924 (2000)(delegating authority), *with Weekes v. City of Oakland,* 21 Cal.3d 386, 390, 579 P.2d 449, 450 (1978)(withholding authority).

The District is not a State. It is a municipality. (Complaint at ¶17). It has no inherent powers and cannot claim to have any taxing authority beyond that delegated by Congress. Thus, the "universal" rule is not applicable to cities such as the District. The prohibition on nonresident personal income taxation is well-within the "norm." The "universal" rule does not suggest a need for review or for heightened scrutiny.[7]

E. There Is No Need For Heightened Scrutiny Because The Congressional Limitation On The Taxing Power Of Its Subordinate Is Not Unlawfully Discriminatory, Nor Was It The Product Of Bias; It Reflects Congress' Considered Judgment On A Matter Of Policy

The District posits that this is a case about "discrimination" by Congress. Likely because it recognizes that any differential treatment is grounded on the Seat of Government Clause, the District apparently concedes that this alleged discrimination survives "rational relationship" analysis and, instead, urges heightened scrutiny.

"Discrimination" is no more than differential treatment. There is a distinction between unfair discrimination and discrimination that is not unfair. *See In Re Bentley,* 266 B.R.

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[7]As mandated by Rule 15.2, Maryland disputes the assertions by the District.

229, 237 (1st Cir. 2001) (describing provision of bankruptcy code). As the First Circuit noted:

> "To discriminate," in its broadest sense, is to make a distinction or to note a difference between two things. *Derivatively, it is to treat two things differently on account of a distinction between them.* Accordingly, in [bankruptcy code] §1322(b)(1), to discriminate is simply to treat two classes differently on the basis of a difference between them; the difference in treatment need not be unfair, wrongful, or even adverse to a class in order to constitute discrimination within the meaning of this statute. The treatment need only be different.

Id. (dictionary definitions in footnotes omitted) (emphasis added).

"Discrimination is the use of some criterion as a basis for a difference in treatment." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002). It is, in and of itself, not wrongful. In the context of civil rights laws, "discrimination" becomes unlawful only when it is based on forbidden criterion, such as race, religion, or gender, and when it results in disadvantageous treatment. *Id.*

The District is treated differently in many respects. District residents, unlike the residents of the fifty states, cannot elect voting representatives to Congress. In *Adams*, this Court held that that difference - or, in the District's terms, that "discrimination" - was lawful. *Adams*, 90 F.Supp.2d at 46-72. And, until recent times, District residents could not vote for president; surely a discrimination, but one that was lawful. Similarly, while any of the fifty states may legislate on

marijuana, the District cannot. That is discrimination, *i.e.*, different treatment; however, it was held to be both lawful and proper. *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002). Congress has controlled the hours that swimming pools were open and regulated meters in taxis in the District. While those controls and regulations were lawful, Congress could not have imposed the same regulations on the states. It was discrimination, in the non-pejorative sense, and it was lawful. Similarly, in *U.S. v. Cohen*, 733 F.2d 128 (D.C.Cir. 1984), a distinctive, or discriminatory, Congressional statutory system was upheld against an equal protection challenge.

The prohibition does not single the District out. *See* U.S. Const., Art. 1, §8, cl. 17 (forts, arsenals, dock yards, and other needful buildings). Just as the Home Rule Act prohibits certain taxation by the District, federal law prohibits State taxation on military installations. 50 U.S.C. §§501, 574. Maryland cannot tax: Fort Meade, sales made at Patuxent Naval Air Station, the two United States Courthouses, Andrews AFB, Aberdeen Proving Grounds, Fort Dietrich, the income of federal service men and women earned in Maryland, 50 U.S.C. §§501, 574, or of Congressional representatives who live in Maryland, *U.S. v. Maryland*, 488 F.Supp. 347, 348 (D.Md.), *aff'd*.636 F.2d 73 (4th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). While the impact may be proportionately greater on the District, the Revitalization Act established a mechanism to compensate the District.

Thus, to state that this is a case about discrimination means only that, in the context of taxing nonresident income, the District is allegedly treated differently than other non-comparable entities - - States - - on account of differences between them. Even if, *arguendo*, correct, that is not, in this context, wrongful. Instead, it is an incident of the basic

framework of the United States Constitution. The District is *sui generis*. The differential treatment does not support a need for review or heightened scrutiny. And, because of the payments made pursuant to the Revitalization Act, the District is compensated for that differential treatment. That mechanism is explained more fully in Part F, below.

The District repeatedly asserts, however, that the prohibition was the product of bias and, specifically, that the voting delegations from Maryland and Virginia were biased against the District. In short, the District asserts that the Maryland and Virginia delegations voted to impose the prohibition in order to benefit their own citizens at the cost of their fellow citizens in the District. The District's three-decade delay in making this claim is telling. In fact, the late Senator Charles Mathias explained the rationale for the prohibition: "The increased Federal payment (to the District) also compensates for the Congress' refusal to permit the District to levy taxes on the income of nonresidents." *Bishop v. D.C.*, 411 A.2d 997 (1980), quoting 117 CONG. REC. 42502. Sen. Mathias' view is consistent with that of Sen. Edward Kennedy, who proposed "that any restrictions on the District's ability to raise revenue from local sources be fully recognized and accounted for in the computation of the Federal financial commitment to the District." *Hearing Before Committee on the District of Columbia on S. 1435*, U.S. Sen., 93d Cong., 1st sess., at 113. Congressional representatives repeatedly stated that, because the District is a federal city, its budget should be supported by the federal government. BACKGROUND at 1123. In short, the decision to impose the prohibition was supported by constitutionally-grounded policy arguments that the federal government should pay the cost of governing the federal city, a city created to serve a unique federal purpose, and that decision was not the product of bias. Thus, to quote Congressman

Diggs, the successful home rule bill was a "reasonable and rational accommodation of the interests of all Americans in their Nation's Capitol. . . ."[8] BACKGROUND at 1507-21. If the appropriations are insufficient, the remedy is to use the mechanism created by the Revitalization Act. The "discrimination" and bias arguments should be rejected. The prohibition on nonresident income taxation reflects Congress's considered judgment on a matter of policy. Decisions under the Seat of Government Clause should not be subjected to heightened scrutiny.

F. Congress Has Created a Mechanism To Compensate The District and Equity Does Not Suggest a Need For Review or Compel Heightened Scrutiny

Because Congress created a mechanism to compensate the District for all federally-imposed restrictions, heightened scrutiny is not proper. The District's argument focuses on only one aspect of the Home Rule Act.

The federal city belongs to the United States as a whole and, if the combination of local tax revenues plus federal support is insufficient to meet legitimate needs, the cost should not be imposed on any subset of citizens, but on the entire

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[8]The analysis in the text, above, refutes the District's *unsupported* contentions that the real reason Congress decided to forbid the District from taxing nonresident income is that members of Congress wanted to benefit their constituents at the expense of the District. Congress had sound policy reasons supporting its action, not the least of which was the creation of statutory mechanisms to compensate the District.

Nation that benefits from having the District as the seat of the national government. Congress expressly recognized this principle by creating a statutory mechanism to compensate the District for the costs imposed by the federal government. Instead of using that mechanism, the District seeks to impose the costs of its local government on all nonresident taxpayers, in addition to the funds those taxpayers already contribute to the District through the Revitalization Act. In short, the District asks that some of its fellow citizens be *twice* taxed to support the District, and its entire argument of discrimination and bias is narrowly focused on the subsection of the Home Rule Act that contains the prohibition, while glossing over the compensatory mechanism in the Revitalization Act.

The duplicative taxation that would result from the District's proposal is easily described. Because of the tax credit system, a nonresident income tax is, in fact, a tax upon those taxpayers who do *not* commute into the District. If the District prevails, non-commuting citizens will pay most of the nonresident income tax, and they will also pay a second time through their federal tax dollars that fund the "bailout" of the District under the Revitalization Act. The plaintiffs are requesting that all Maryland taxpayers shoulder a federal burden, imposed by Congress to further federal interests, because some Maryland residents commute to the District to do

business with the federal government that is located there.[8] They make this request because Congress does not appropriate as much money as the District thinks it should, and even though it was Maryland's gift that conveyed the very land upon which the District sits.

Maryland supports the legitimate goals of its fellow citizens in the District to have adequate public services. No states benefit more from a healthy District than Maryland and Virginia. Maryland, however, differs from the District in its analysis of the alleged problem[9] and the solution. The District's Complaint is a misplaced policy argument framed in legal terms. Congress rejected the District's position because it

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[8] *Commuter Tax, Hearings and Markups of the Subcommittee on Fiscal and Gov't. Affairs and the Committee on the District of Columbia on H.R. 11303 and H.R. 10116* (to repeal the prohibition and to impose a nonresident income tax) 95th Cong., 2d sess. (1978)(hereinafter "Repeal"), at 195 (Stmt. of Rep Spellman; "[T]hey would be paying twice."), 179, 182-83 (Stmt. of Rep. Harris); *Commuter Tax, Staff Study and Report for the Subcommittee on Fiscal Affairs of the Committee on the District of Columbia,* 94th Cong., 2d Sess. (hereinafter "*Staff Study*"), at 28; *Commuter Tax, Hearings and Markup before the Subcommittee on Fiscal Affairs and the Committee on the District of Columbia on H.R. 11579 and H..R. 14621*, 94th Cong., 2d Sess. (hereinafter "1976 Hearings") at 173 (Stmt. Of Lt. Gov. Lee: "[T]he loss would be sustained not by the suburban commuters but by the treasury of the State of Maryland. This thing. . . is a tax on the State of Maryland.").

[9] Maryland does not mean to imply that the United States has failed to meet its obligations. Instead, Maryland assumes, as it must, FED.R.CIV.P. 12(b)(6), the facts alleged.

would create inequities, especially in light of the existing statutory mechanism to redress the alleged wrong.

In order to alleviate the burdens of being the Nation's Capital, the District receives substantial federal funding. (Complaint at ¶¶39). Thus, because of the District's unique role in assuring the independence of the national government, the Home Rule Act created a mechanism to compensate the District. When it enacted the prohibition, Congress also provided for regular payments "to cover the proper share of the expenses of the District government." *Hearing Before the Comm. on the District of Columbia on S. 1435,* 93rd Cong., 1st Sess., 64.

That compensatory mechanism[10] has since changed. In the Revitalization Act, Congress found that its building height restrictions, its limitations on the District's ability to tax income, and the unique status of the District as the seat of government, play a "significant role in causing the relative tax burden on District residents to be greater than the burden on residents in other jurisdictions in the Washington, D.C. metropolitan area. . . ." Congress then, in §11601(c)(2), authorized a "Federal contribution towards the costs of the operation of the government in the Nation's capital" of $190,000,000 in FY 1998 and an amount to be determined for each subsequent year. Congress stated: "In determining the

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[10]The Revitalization Act was intended to "address funding mechanisms" and "provide mechanisms" for resolving the District's problems. C. Palmer, *Waiting for Democracy: Congress, Control Boards, and the Pursuit of Self-Determination in the District of Columbia*, 19 HAMLINE J. PUB. L. & POL'Y 339, 339 (1991) (citation omitted).

amount appropriated pursuant to the authorization under [11601(c)(2)], Congress shall take into account the findings described in paragraph (1)," including the prohibition.

The Revitalization Act was designed to "resolve the city's cash shortfall. . . ." The President's National Capital Revitalization and Self-Government Improvement Plan, 1997 WL 12985. "[T]he United States came to the rescue of Washington, D.C. . . ." C. Palmer, *Waiting for Democracy: Congress, Control Boards, and the Pursuit of Self-Determination in the District of Columbia*, 19 HAMLINE J. PUB. L. & POL'Y 339, 339 (1991). The statute was a "highly technical bailout. . . ." *Id.* "Millions of dollars were injected into the City's lagging budget." *Id.* at 345-46.

President Clinton stated that the purpose of the Revitalization Act was to *"remove from the District of Columbia the burdens that are normally borne by a state. . . ."* *Id.* at 363 (emphasis added)(citation omitted). The Federal Government assumed control over many vital city functions, such as courts, prisons, and administration of Medicaid payments. *Id.* at 345-46. The District's $4.8 billion pension shortfall was transferred to the United States. *Id.* at n. 88; Revitalization Act at §11002(b)(2).

In short, in the Revitalization Act, Congress identified the federal causes of the District's problems and acted to address the same financial issues of which the District now complains. Federal taxpayers assumed more than $5 billion of the District's obligations. Maryland citizens must pay their share of that bailout.

The District repeatedly asserts that the current situation is unfair; however, it fails to demonstrate that equity provides the

applicable constitutional standard. Furthermore, it is far from clear that equity is the District's ally. The District, complaining of taxation without representation, seeks to double tax the unrepresented citizens of the fifty States, who have no choice but to enter the District on federal business.

As the District has repeatedly acknowledged, the source of its grievance lies in the Constitution and Congress. The District points to, for example, its Constitutionally-fixed borders, Congressionally-imposed building height limitations, the Congressional limitation on taxing nonresidents, and its federally-imposed inability to tax federal property. *E.g.*, Repeal at 129; *Staff Study* at 28. Congress, itself, has specifically addressed these same factors. Revitalization Act, §11601(c)(1)(A - D). In short, the "major reason for the District's limited tax base is the restrictions imposed on it by the Federal Government. . . ." Repeal at 180 (Stmt. of Rep. Harris). Thus, if there is a revenue shortfall, it has been caused by federal laws. *But see* Balanced Budget Act of 1997 at §11301 (chronicling District's historically poor record of determining and collecting tax revenue due to it); Complaint at ¶40 (District's inefficiency).

Nevertheless, the District asserts that "fairness" dictates that Maryland taxpayers reimburse the District for these federally-imposed costs. The District's constitutional argument would lead to imposition of double taxes on nonresidents, because Congress has already established a funding mechanism in the Revitalization Act. At bottom, the District's argument is with Congress; however, the District seeks the power to tax Maryland, rather than addressing the appropriate funding source.

Thus, contrary to the District's suggestion of Congressional bias, the prohibition evidences Congressional intent that the United States should pay for the needs of the Capital. The reason for enactment of the prohibition has been simply stated:

> Senator Charles Mathias elucidated the rationale for enacting the prohibition found in §602(a)(5) of the Act: "The increased Federal payment (to the District) also compensates for the Congress' refusal to permit the District to levy taxes on the income of nonresidents."

Bishop, 411 A.2d at 998. (citation omitted).

One may argue, as the District does, that Congress is not properly responding to the District's requests and needs; however, a mechanism exists to compensate the District for the imposition of the prohibition on nonresident income taxes, the District has used, or is free to use, that mechanism, and its requests for compensation have been addressed by Congress.

As one commentator observed:

> Certainly, suburban commuters benefit[11] from not paying a commuter tax. But such a benefit results from Maryland and Virginia having given 10 square miles of land to the country in 1789. All fifty states share land that once belonged to the citizens of Maryland. To place the financial burden of the District of Columbia on the shoulders of suburban commuters is akin to saying, "Thank you for the land, we assume you will continue to be responsible for its maintenance." The District of Columbia is the capital of the entire nation, and all fifty states should share the cost of resolving its problems.

D. Florenzo, *DCERA: A Solution to the District of Columbia's People Problem*, 86 GEO. L.J. 181, 194 (1997); *accord* Repeal at 190 (Stmt. of Rep. Holt); 1976 Hearings at 173 (Stmt. of Montgomery County Executive); *id.* at 164 (Rep. Holt).

Because the District's complaints are based on federal statutes and the United States Constitution, it "should look to the residents of all 50 States to redress the consequences of

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[11]While the District complains of the costs imposed by commuters, "District business growth is constrained by lack of an adequate workforce. . . ." Richard Monteilh, *Testimony Before H. Approp. District. Subcomm.*, 2001 WL 2007413, at *2 (Apr. 26, 2001) (available at www.dcwatch.com/govern/econ010426d.htm). Commuters create jobs for District residents. 1976 Hearings at 185. The District vigorously opposes efforts to reduce its role as the Capital. Democracy, 99 Dick.LRev. at 563, 570, 590; R. Monteilh, Testimony, 2001 WL 2007413 *2. It is inconsistent to assert that commuters impose a burden while simultaneously seeking more commuters.

these restrictions. . . ." Repeal at 180 (Stmt. of Rep. Harris); BACKGROUND at 1123 (Stmt. of Rep. Gude: "to the extent that there is a deficit in the [District] budget to be made up by the citizens of the whole country, this is a Federal city and I think it is a Federal responsibility.").

G. Summary

The prohibition against taxation of nonresident income is the product of sound policy, not discrimination or bias. If the District believes that policy is implemented unfairly, it should petition its legislature - - the Congress. That entity has, within its plenary power, created a mechanism to redress any legitimate grievance.

CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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(2)

No. 05-970

In the Supreme Court of the United States

JAMES M. BANNER, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Exercising its plenary authority to legislate for the District of Columbia, Congress enacted D.C. Code § 1-206.02(a)(5) (2001), which prohibits the District of Columbia Council from imposing a tax on the personal income of nonresidents. The questions presented are:

1. Whether that provision discriminates against District residents in violation of the equal protection component of the Fifth Amendment.

2. Whether the provision violates the Uniformity Clause of the Constitution.

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City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 5
Palmore v. *United States*, 411 U.S. 389 (1973) 4
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 7
United States v. *Ptasynski*, 462 U.S. 74 (1983) 7

Constitution and statute:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Uniformity Clause) 2, 3, 5, 6
Cl. 17 (District Clause) 2, 4
Amend. V 2
Due Process Clause 2, 4
D.C. Code § 1.206.02(a)(5) (2001) 2

In the Supreme Court of the United States

No. 05-970

JAMES M. BANNER, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 428 F.3d 303. The opinion and order of the district court (Pet. App. 19a-64a) are reported at 303 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on November 4, 2005. The petition for a writ of certiorari was filed on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1-206.02(a)(5) of the D.C. Code prohibits the District of Columbia Council (D.C. Council) from imposing a personal income tax on persons who do not reside within its borders. Petitioners (certain District of Columbia taxpayers, the District of Columbia, the D.C. Council, the members of the Council, and the Mayor of the District of Columbia) filed suit against the United States and the Attorney General, challenging that restriction. Pet. App. 65a-91a. Petitioners alleged, *inter alia*, that the restriction violates the equal protection component of the Due Process Clause and the Uniformity Clause of the Constitution, Amend. V, Art. I, § 8, Cl. 1. See Pet. App. 83a-87a.

The State of Maryland and the Commonwealth of Virginia intervened as defendants, and the federal defendants and the intervenors moved to dismiss the complaint. Pet. App. 5a. The district court granted those motions. *Id.* at 19a-64a.

The district court held that the equal protection component of the Fifth Amendment is not implicated because District residents are not similarly situated to nonresidents who work in the District. Pet. App. 44a-50a. The court alternatively held that, even if the equal protection component of the Fifth Amendment were implicated, the prohibition on taxing non-residents would not be subject to heightened scrutiny and would readily withstand rational-basis review. *Id.* at 45a-58a.

The district court also held that the Uniformity Clause does not limit Congress's power under the District Clause (U.S. Const. Art. I, § 8, Cl. 17) to enact local laws applicable to the District. Pet. App. 58a-61a. The court alternatively held that even if the Uniformity

Clause were applicable, the prohibition against taxing non-residents is a permissible means of addressing a geographically isolated problem. *Id.* at 61a.

2. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioners' contention that strict scrutiny is required because the restriction on taxing non-District residents discriminates against District residents. *Id.* at 6a-11a. The court noted that the Constitution gives Congress plenary authority to legislate for the District, *id.* at 9a, and it concluded that petitioners' claim amounted to a dispute "with the plan of the Constitution and the judgment of its Framers." *Id.* at 10a. The court also held that the restriction easily satisfies rational basis review. *Id.* at 11a. The court explained that "Congress may have been concerned that a commuter tax would cause District businesses to relocate to nearby Maryland and Virginia, where income tax rates are generally lower," * * * [o]r it may have decided that the enhanced burden of financing the District's operation should fall on the nation at large, rather than on the residents of neighboring sta[illegible]." *Ibid.*

The court of appeals also rejected petitioners' claim that the restriction on taxing non-District residents violates the Uniformity Clause because it prefers the States at the expense of the District. Pet. App. 12a-15a. The court explained that petitioners' argument "is inconsistent with Congress's constitutional authority over the District." *Id.* at 14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The Constitution gives Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" with respect to the District of Columbia. U.S. Const. Art. I, § 8, Cl. 17. Under that grant of authority, Congress may not only apply statutes of nationwide application to the District, but it "may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973). The restriction on the D.C. Council's authority to tax the personal income of non-District residents falls squarely within Congress's constitutional authority to legislate for the District.

2. Petitioners contend (Pet. 18-23) that the restriction at issue here triggers strict scrutiny under the equal protection component of the Due Process Clause because it discriminates against District residents and in favor of non-District residents. In support of that contention, petitioners rely (Pet. 19) on decisions of this Court that have invalidated *State* taxes that discriminated against *non-residents* of the State.

Petitioners' reliance on those cases is misplaced. When Congress legislates with respect to the District, its treatment of District residents is not comparable to a State's treatment of non-residents. To the contrary, because Congress has exclusive legislative authority over the District (U.S. Const. Art. I, § 8, Cl. 17), "when it legislates for the District, [it] stands in the same relation to District residents as a state legislature does to residents of *its own* state." Pet. App. 9a. Just as state legislation that singles out state residents for taxation raises no equal protection concerns, congressional legislation that singles out District residents for taxation raises no equal protection concerns.

More generally, equal protection principles require only that similarly situated persons be treated alike. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Under the structure of the Constitution, residents of the District and non-District residents are not similarly situated. As the district court explained, "the residents of the District are treated under the Constitution as a distinct class that is not comparable to any other group of citizens." Pet. App. 45a.

Nor does petitioners' equal protection claim gain force from the fact that District residents do not vote for Members of Congress. Instead, as the court of appeals explained, under the Constitution's structure, "Congress is the District's government, * * * and the fact that District residents do not have congressional representation does not alter that constitutional reality." Pet. App. 10a. At bottom, petitioners' plea for strict scrutiny in this context cannot be reconciled "with the plan of the Constitution and the judgment of its Framers." *Ibid.*

To the extent that any equal protection analysis is warranted in this context, the relevant inquiry is whether Congress had a rational basis for prohibiting the D.C. Council from imposing taxes on non-District residents. That standard is easily satisfied here. As the court of appeals explained, Congress may have imposed a restriction on taxing non-District residents because it was concerned that such a tax might cause District businesses to relocate, or because it concluded that the additional money necessary to fund the District should come from the Nation as a whole, rather than from the residents of neighboring States. Pet. App. 11a.

3. Petitioners' claim based on the Uniformity Clause (Pet. 24-26) is equally without merit. The Uniformity Clause provides that "Congress shall have Power To lay

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1.

Because Congress has authority to legislate separately for the District, the Uniformity Clause can have little or no application to such legislation. As the court of appeals explained, "[g]iven Congress's authority under the District Clause, the Uniformity Clause would appear to have little relevance to Congress's local taxation of the District." Pet. App. 13a.

Relying on *Binns* v. *United States*, 194 U.S. 486 (1904), petitioners contend (Pet. 24-26) that the Uniformity Clause limits Congress's authority to enact legislation for the District. In that case, however, the Court held that the United States could commingle tax revenue generated in the then-territory of Alaska with other funds in the Treasury. 194 U.S. at 494. That holding provides no support for petitioners' argument here. Petitioners rely on the Court's statement in dicta that a different result might obtain in a case in which "Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation, as distinguished from that necessary for the support of the territorial government." *Id.* at 496. But that dicta does not assist petitioners. As the court of appeals explained, the restriction at issue here "does not generate surplus tax revenue beyond the needs of the District for the benefit of the nation." Pet. App. 14a. To the contrary, the restriction "raises no revenue at all." *Ibid.* Moreover the taxes the District *does* raise, within the limits imposed by Congress, are

used to support the District Government, not the Nation as a whole.

Even if the Uniformity Clause applied to the restriction on taxation of non-District residents, that Clause "'does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 83-84 (1983) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974)). The restriction on taxation of non-District residents reflects Congress's recognition that the District of Columbia is the capital of the Nation as a whole, that it has unique attributes as a result, and that responsibility for funding the District Government should not fall disproportionately on Maryland and Virginia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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